SOUTHERN UTAH WILDERNESS ALLIANCE
(ON RECONSIDERATION)

IBLA 91-345, 93-18, 93-50 Decided February 21, 1995

Petition for reconsideration of the Board's decision in IBLA 91-345, Southern Utah Wilderness Alliance, 127 IBLA 325 (1994), in which the Board dismissed for lack of standing Southern Utah Wilderness Alliance's appeal of an administrative determination by the Moab District Manager, Bureau of Land Management, that the Lawrence-Tan Seeps Road is a R.S. § 2477 right-of-way.

Petition for reconsideration granted; 127 IBLA 325 vacated; Motion to supplement record in IBLA 91-345 granted; IBLA 91-345, IBLA 93-18, and IBLA 93-50 consolidated; IBLA 91-345, IBLA 93-18, and IBLA 93-50 set aside and remanded.

1. Act of July 26, 1866--Rights-of-Way: Revised Statutes Sec. 2477--Rules of Practice: Appeals: Reconsideration

   Reconsideration of a Board decision dismissing an appeal for lack of standing to appeal an administrative determination by BLM that a road is a R.S. § 2477 right-of-way will be granted and the decision vacated where it is established that the determination was made in connection with a proposed road improvement project which would allegedly adversely affect public lands and resources.

APPEARANCES: Wayne G. Petty, Esq. and Stephen Koteff, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance; David K. Grayson, Esq., Assistant Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; Barbara G. Hjelle, Esq., St. George, Utah, for Emery County, Utah.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Southern Utah Wilderness Alliance (SUWA) has petitioned for reconsideration of the Board's decision in Southern Utah Wilderness Alliance, 127 IBLA 325 (1993), in which the Board dismissed for lack of standing SUWA's appeal of a May 1, 1991, administrative determination of the Moab District Manager, Bureau of Land Management (BLM), that the Lawrence-Tan

Seeps Road (Emery County Road No. 332), hereinafter referred to as the Buckhorn Road, situated in Emery County, Utah, was a "valid right-of-way under the provisions of the Act of July 26, 1866, Revised Statute (RS) 2477, (43 U.S.C. 932 (repealed 1976))." 1/

SUWA complains that the procedural regulations governing the filing of appeals from decisions of officials of BLM do not require, with one exception not relevant in this case, that an appellant include with its notice of appeal or statement of reasons a statement of standing. SUWA does recognize, however, that the Board has on numerous occasions interpreted 43 CFR 4.410(a) as requiring that an appellant must be a party to the case and must also have a legally cognizable interest that is adversely affected by the decision at issue. Accordingly, SUWA requests the opportunity to demonstrate its standing at this time and in support of that request it submits the declaration of Ken A. Rait, Issues Coordinator for SUWA. SUWA moves that the record be supplemented by that declaration. That motion is granted.

In dismissing SUWA's appeal in this case, we stated:

> That SUWA's organizational interest in protection of the public lands, which its members utilize, might be adversely affected by a BLM action is not in dispute. However, SUWA may not rely on that general organizational interest alone in challenging a BLM action. It must identify how the particular BLM action in question actually adversely affects its interest. It has not done so in this case.

127 IBLA at 329.

SUWA now maintains that Rait's declaration shows how it is adversely affected by BLM's determination and it moves for consolidation of this case with IBLA 93-50, which involves an appeal by SUWA of an October 9, 1992, Decision Record granting right-of-way UTU-66121. 2/

Rait states in his declaration that many SUWA members have traveled the Buckhorn Road and have used it as access to use and enjoy the adjoining public lands. He maintains that SUWA will be adversely affected by BLM's R.S. § 2477 determination for the road because the "primitive nature of the access" to outstanding places in the area "is an important part of the overall experience * * *" (Declaration at 1). He states that "[e]nvironmentally degrading upgrades * * * will result in immediate injury to the

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1/ The road is referred to by various other names in the record, including the "Buckhorn Wash trail, the "Buckhorn Wash Road," and the "Buck Horn Wash."

2/ In an order dated Jan. 13, 1994, the Board dismissed that part of IBLA 93-50 relating to temporary use permit UTU-67439 because the County relinquished its application for that permit.

federal lands through which the road passes and adjacent federal lands. This injury will be caused by construction activities by Emery County on the Road and the adjacent federal land" (Declaration at 2). He also claims that "[r]oad upgrades resulting from the issuance of the RS 2477" will degrade Bighorn sheep habitat; that "[r]oad improvements" along the road will degrade the value of archeological resources; and that "[u]pgrades" of the road will be intrusive to outstanding wilderness values where the road passes between two wilderness study areas (Declaration at 2-3).

In an order dated January 21, 1994, we granted a request by counsel for Emery County for leave to file an answer to the petition. In addition, we directed BLM to file an answer to the petition. We further directed that both Emery County and BLM should address whether or not there was a road project at issue in this case at the time the R.S. § 2477 determination was made, directing their attention to a document which was not part of the record forwarded to the Board in IBLA 91-345, but which was submitted by counsel for SUWA as exhibit 2 of the statement of reasons in its appeals docketed as IBLA 93-18, a letter from the Supervisor, Emery County Road Department, to BLM, dated March 1, 1990. That letter stated "[e]nclosed please find a right-of-way application, roadway plan and profile sheets, location map, right-of-way description, typical section drawing, and Table A describing road alignment changes, for the Buckhorn Draw road realignment proposal."

Our purpose in eliciting comment on that letter was that in our decision we had distinguished Sierra Club v. Hodel, 675 F. Supp. 594 (D. Utah 1987), aff'd in part and rev'd in part, Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), in part on the basis that in IBLA 91-345 no road project was at issue. 3/

In its answer, BLM made no attempt to address the March 1, 1990, letter. However, the County, in its answer, argues that no road project was at issue at the time of BLM's determination and that the March 1, 1990, letter does not establish otherwise. The road alignment proposal of the March 1, 1990, letter, the County argues, was the subject of a September 1, 1992, BLM finding of no significant impact (FONSI), based on environmental assessment (EA UT-067-90-034) and BLM's October 9, 1992, Decision Record granting right-of-way UTU-66121, and associated temporary work areas to the County, both of which have been challenged by SUWA in IBLA 93-18 and IBLA 93-50, respectively. The County asserts that the administrative determination did not "authorize or recognize any right to realign the existing road or perform any work beyond routine maintenance activity" (Answer to Petition for Reconsideration at 6).

3/ In Sierra Club, the court rejected the Department's contention that the plaintiffs, including SUWA, lacked standing based, in part, on its finding that the plaintiffs' allegations of injury were directly related to the road improvement project involved in that case.

Despite the County's explanation, it is difficult to ignore the County's statement at page 3 of its answer in IBLA 93-50:

> On or about May 1, 1991, over one year after Emery County had submitted its right-of-way application, BLM acknowledged the County's R.S. § 2477 right-of-way for the Buckhorn Draw Road and instructed the County to proceed with its application for right-of-way permits for four places where the improvements would deviate somewhat from the existing alignment. No action was ever taken on the earlier right-of-way application for the whole road.

In addition, in its answer in IBLA 93-50, BLM states: "On May 1, 1991, the San Rafael Area Office of the Bureau of Land Management (BLM) issued an Administrative Determination that a right-of-way exists on the Lawrence-Tan Seeps Road (also known as the Buckhorn Road) in Emery County pursuant to R.S. § 2477 * * *. Prior to that decision, application had been made by Emery County to improve this road." Id. at 1.

Thus, it is clear that at the time BLM made its R.S. § 2477 determination the County had a proposed road improvement project for the Buckhorn Road pending with BLM.

The case record shows that for over 20 years the County and BLM operated under memoranda of understanding regarding the construction and maintenance responsibilities for roads in Emery County. "Memorandum of Understanding to Clarify Road Construction & Maintenance Responsibilities in Emery County between the Bureau of Land Management and the Emery County Commission," dated April 30, 1971, (MOU 1971) was to continue in effect "until terminated by mutual agreement." Under MOU 1971, the County was to provide maintenance for various roads, including the one at issue, as identified in Attachment B to the MOU. 4/ Effective December 11, 1980, the County and BLM entered into another memorandum of understanding (MOU 1980) clarifying road construction and maintenance responsibilities. Under MOU 1980, the County agreed that

> the roads shown and listed on Attachments A and B are all the roads indicated under RS 2477 (43 U.S.C. 932) as of October 21, 1976, [and] that any new road, the extraction of road material therefrom, or the realignment or relocation of a road will be

4/ Attachment B identifies roads by number and name. While the Buckhorn Road is not specified on that attachment by a single name or number, a combination of certain roads or segments of Attachment B roads, as depicted on a map accompanying Attachment B in the case record, shows the route of that road.

in compliance with the right-of-way procedure of the Bureau established pursuant to the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701-1782) and Title 43 of the Code of Federal Regulations 2800 et seq. 5/

MOU 1980 was to continue for "10 years unless sooner terminated by mutual agreement, or upon 90 days written notice of either party."

Apparently, MOU 1980 expired by its own terms in 1990 and no new MOU was executed. Thus, it appears that the motivating factor for BLM's action in May 1991 was the County's proposed road project for the Buckhorn Road. However, in making its determination, BLM did not attempt to define the scope of the R.S. § 2477 right-of-way, and, despite the County's assertion in its answer to the petition for reconsideration that BLM's determination did nothing more than authorize routine maintenance, the record shows that the County's idea of routine maintenance differed considerably from that of BLM and, in fact, its "routine maintenance" clearly had an impact on the public lands. 6/

Under such circumstances, it is difficult to conclude that SUWA is not adversely affected. Accordingly, we must grant the requested reconsideration and vacate our decision at 127 IBLA 325. In addition, we hereby consolidate with this appeal the other two appeals of SUWA involving the Buckhorn Road, IBLA 93-18 and 93-50. IBLA 93-18 is an appeal of the FONSI issued by the San Rafael Resource Area Manager on September 1, 1992, based on EA UT-067-90-034, for road improvements on approximately 6 miles of the Buckhorn Road, designated in the EA as the "Upper Segment." IBLA 93-50 is an appeal from the Area Manager's October 9, 1992, Decision Record granting right-of-way UTU-66121.

5/ Attachment B to MOU 1980 provides new numbers and names for roads in the county. Again, the Buckhorn Road is not identified on that attachment by a single name, but all or part of the Buffalo-Wedge Overlook (6729), the Green River Cutoff (6743), the Buckhorn-Sagebrush Interchange (6750), and the Sagebrush Interchange-Tan Seep (6853), as depicted on a map accompanying Attachment B in the case record, constitute the route of the Buckhorn Road, for which the county was responsible for road maintenance.

6/ In October 1992, the County proceeded to realign parts of the Buckhorn Road ostensibly under its R.S. § 2477 routine maintenance authority. However, that action resulted in resource damage and BLM issued trespass notices and a cease and desist order. The matter was ultimately resolved in United States v. Emery County, Utah, No. 92-C-1069S (D. Utah), by the issuance of a Consent Decree, approved by Judge David Sam on Dec. 14, 1992, providing that the County was required to have BLM approval for any improvement or realignment of any acknowledged R.S. § 2477 highway, except that it was not required to notify BLM of routine maintenance within the previously disturbed area and on existing associated structures. See U.S. Department of the Interior, Report to Congress on R.S. § 2477, dated June 1993, at Appendix IV, Exh. A.

These consolidated cases raise many issues regarding R.S. § 2477 rights-of-way. However, we do not believe that this Board is the appropriate forum to resolve these issues at this time. The reason for that conclusion is that during the pendency of these appeals the Department has undertaken to establish its policy on recognizing the existence and scope of R.S. § 2477 rights-of-way by regulation and/or other administrative procedures. 7/ Present adjudication of R.S. § 2477 issues by the Board might undercut that effort. Accordingly, we conclude that the proper course of action is to set aside BLM's R.S. § 2477 determination, its FONSI, and its Decision Record and remand these cases to BLM to await development by the Department of its R.S. § 2477 policy. 8/ To the extent the County needs to maintain the Buckhorn Road in the interim, its actions should be guided by the December 14, 1992, Consent Decree.

7/ On Aug. 1, 1994, the Department promulgated proposed regulations establishing a process for the formal recognition by the Department of rights-of-way that were validly acquired pursuant to R.S. § 2477 prior to its repeal. 59 FR 39216, 39219 (Aug. 1, 1994). In addition, it provided advance notice of proposed rulemaking announcing the Department was "considering whether to develop regulations or other administrative procedures to manage rights-of-way validly acquired pursuant to R.S. § 2477, and if so, what kind of regulations to develop." 59 FR 39228 (Aug. 1, 1994). Under the proposed regulations, the Department would recognize that a right-of-way was validly acquired pursuant to R.S. § 2477 only if the determination was made by a Federal or Territorial court or by the authorized officer (in the case of BLM, a BLM State Director) in accordance with the proposed regulations. 43 CFR 39.4, 59 FR 39226 (Aug. 1, 1994). In addition, under those regulations, the United States would retain "the authority to regulate routine maintenance, construction, improvement, use, and operation of the right-of-way." 43 CFR 39.5(b), 59 FR 39226 (Aug. 1, 1994).

8/ We note that the work authorized by right-of-way UTU-66121 on the Upper Segment of the Buckhorn Road was undertaken and completed in trespass by the County prior to its acceptance of that right-of-way as part of the settlement of trespass. (See Emery County's Answer in IBLA 93-50 at 3-5; and Exhs. G and H, attached thereto). Thus, that part of the construction objected to by SUWA has occurred and, to the extent possible, BLM has directed that resource damage from that action be mitigated. Should the County desire to undertake improvements to the "Lower Segment" of the Buckhorn Road (approximately 4.0 miles), which forms the eastern boundary of the Sids Mountain Wilderness Study Area (WSA), with a small portion (approximately 1,000 feet) paralleling the western boundary of the Mexican Mountain WSA, BLM would be required to address in National Environmental Policy Act documentation the issues of impact and segmentation raised herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to supplement the record in IBLA 91-345 is granted; the petition for reconsideration is granted; our decision reported at 127 IBLA 325 is vacated; IBLA 91-345, IBLA 93-18, and IBLA 93-50 are consolidated; and the BLM decisions in IBLA 91-345, IBLA 93-18, and IBLA 93-50 are set aside and remanded for action consistent with this decision.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge